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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

SEABOARD AIR LINE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the United States District Court for the Eastern District of Virginia denying recovery of statutory penalties provided by the Safety Appliance Act, 45 U. S. C. 6.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (App., *infra*, pp. 20–41) are reported at 258 F. 2d 262.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (App., *infra*, p. 20). On September 23, 1958, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and in-

cluding November 28, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court below employed improper standards in holding movements of transfer trains exempt, as switching operations, from safety requirements imposed by Congress on movement of "any train."

STATUTES AND ORDER INVOLVED

The Act of March 2, 1893, c. 196, 27 Stat. 531, as amended, provided:[1]

> Sec. 1 [45 U. S. C. 1] * * * [I]t shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with * * * appliances for operating the train-brake system, or to run any train in such traffic * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.
>
> * * * * *
>
> Sec. 6 [45 U. S. C. 6] * * * [A]ny such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered

[1] On August 14, 1957, the statute was further amended and the penalty was increased to $250 (71 Stat. 352, 45 U. S. C. (Supp. V) 6).

in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed * * *.

The Act of March 2, 1903, c. 976, 32 Stat. 943, amending the 1893 Act, provided:

> Sec. 2 [45 U. S. C. 9] * * * [W]henever, as provided in said Act [of March 2, 1893, *supra*] any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

The order of the Interstate Commerce Commission, dated June 6, 1910 (49 C. F. R. 1321), provided:

> On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per

cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated.

STATEMENT

In a suit for statutory penalties filed in the United States District Court for the Eastern District of Virginia, the United States charged respondent, in four separate counts, with the operation of four trains without coupling of the air brakes, in violation of the Safety Appliance Acts (2 R. 1–6).[2] The respondent, in its answer, admitted the respective operations but contended that they were switching operations, not train movements (2 R. 7–9).

The facts may be summarized as follows:

Respondent has established in the city of Hopewell, Virginia, a yard known as its "classification or assembly yard." All trains to or from Hopewell pass through this yard for breaking up or assembly. From this classification yard, a track extends through the city of Hopewell for a distance of approximately two miles to the lead tracks of the Allied Chemical and Dye Company and Continental Can Company plants; this track running from the classification yard crosses, at grade, five streets (one of which is Virginia State Route 10), two private roads, four tracks of the Norfolk & Western Railroad, and a track for interchange

[2] The printed appendix to the government's brief below is designated "1 R.", and the supplemental appendix is designated "2 R.".

with Norfolk & Western. The track is also used by engines of Allied Chemical for short distances near the Allied Chemical plant. Nine industrial sidings or spur tracks branch off between the classification yard and Allied Chemical and Continental. After an incoming train has been broken up in the classification yards, an engine is coupled on to the cars which are to be delivered over the lead track. The cars consigned to customers of respondent Seaboard are hauled to the appropriate spur (2 R. 10–11, 15, 20–23, 44).

In September, 1951, inspectors of safety appliances for the Interstate Commerce Commission advised respondent that air brakes were required to be coupled and in operation on movements from the classification yard to the Allied Chemical and Continental plants. Thereafter, the brakes on cars engaged in such operations were coupled (2 R. 48–49). However, in January, 1956, respondent discontinued the coupling because of "the time element" that was involved, because of a 30% increase in business in the area, and because of respondent's conclusion that "there was no undue or unusual risk" (2 R. 49–51).

In March, 1956, the inspectors visited the area and observed the four admitted failures to couple brakes which gave rise to the four counts, as follows:

1. On March 5, 1956, a locomotive and 26 cars went as a single unit, without stops, from the lead tracks of the Allied Chemical plant for two miles to the classification yard (2 R. 2–3, 18–19).

2. On March 5, 1956, a locomotive and 28 cars similarly traveled two miles from the classification yard

to the lead track of the Allied Chemical plant (2 R. 4, 27).

3. On March 5, 1956, a locomotive and 29 cars were taken from a track near the Allied Chemical plant to the Norfolk & Western interchange track (which is about midway between the plant and the classification yard, App. *infra*, pp. 21–22). There, the locomotive was detached, coupled to 20 additional cars on the interchange track, and the entirety coupled to the 29 cars. The total of 49 cars was taken intact the remaining distance of approximately a mile to the classification yard (2 R. 5, 29–31).

4. On March 6, 1956, a locomotive and 23 cars went from the classification yard for two miles to the lead track of the Continental Can plant (2 R. 6, 31).

The foregoing movements were at speeds of 4 to 13 miles per hour. No cars were picked up or set out, except for the straight pickup of 20 cars noted above in the third case. No sorting, selecting, or classifying of cars occurred on the line between the classification yard and the company tracks. The crew knew the operation was to be a straight run before the train started (2 R. 19, 27–28, 30–31, 35–37).

The district court rendered judgment for the defendant, holding that only "shifting movements" were here involved (2 R. 14). The judge concluded (2 R. 14), that "no absolute standard is available for determining whether a particular movement is a train movement * * * or whether it is a shifting movement * * *. Instead, each case must be decided on its merits, giving full consideration to the purpose be-

hind the statute and its implementing regulations and all pertinent facts."

In a letter order of June 28, 1957, the judge adopted the findings submitted by respondent railroad (2 R. 15) which included the following: that respondent designated as within "yard limits" not only the classification yard but also the two miles of track to the lead tracks of the Allied Chemical and Continental plants (2 R. 10); that Norfolk & Western, on its track for interchange of cars with respondent, did not couple the brakes (2 R. 11); that Norfolk & Western tracks crossing respondent's track at grade were used "to serve industries only" and that signs on the former's tracks gave respondent's trains the right of way (2 R. 11); that street crossings were provided with warning devices to travelers on the highways and that a watchman was stationed at one street crossing (2 R. 11); that traffic over the private crossings "is generally light"; that traffic over the street crossings "varies from moderate to heavy * * * the heavy traffic occurring at hours which do not coincide with the usual hour for movements along the tracks here involved, but there are no scheduled movements" (2 R. 11–12); that there was "no evidence that the movements complained of or similar movements have at any time or in any way

[1] In a letter order of April 4, 1957, the judge had stated that "the safety record of [respondent] and the added cost of operation are not controlling", but assumed that they "are worthy of consideration" along with "other facts" (1 R. 35–36). He included, as facts which he had considered in determining whether a "train" was here involved, "the number and nature of the grade crossings" (1 R. 36–37).

interfered" with a fire department and emergency station on one of the cross streets a few hundred feet from the track (2 R. 12); that all movements within the "yard limits" are under the direction of respondent's "agent" (2 R. 12); that on the second and fourth movements some of the cars were ahead of the engine (2 R. 12, 13); that there was no perceptible grade on the track involved (2 R. 13); that respondent's rules prohibit speed in excess of that permitting a stop within half the range of vision (2 R. 13); that in the past 27 years there had been only four crossing accidents, *i. e.*, two in 1941, one in 1944, and one in 1954,* and that there had never been an injury to an employee on a movement between the classification yard and the industrial plants or spurs (2 R. 13); that for respondent to connect the air brakes on such movements "would result in a delay of approximately forty minutes on each movement and entail an additional annual expense of $30,000 for wages alone, and other expenses" (2 R. 13–14); and that the movements "would not have been less hazardous to employees or the public if air brakes had been coupled and used" (2 R. 14).

The Court of Appeals for the Fourth Circuit affirmed, Chief Judge Sobeloff dissenting. The majority opinion stated that there was no difference in the "nature of the work" between a run which worked every spur along the two-mile lead track and one which did not; that the business on the track was the distribution of cars from trains which had completed

*The accidents were collisions with automobiles. Three involving trains did not have their air brakes coupled (2 R. 47–48).

their "over-the-line run" and the assembly of cars into "outgoing" trains (App. *infra*, pp. 24–25). The court distinguished the instant operations from "movements between major terminals" (App. *infra*, p. 26), "movements * * * over main line tracks" (App. *infra*, pp. 26–27), and "line haul" (App. *infra*, p. 28). It reasoned that, under the instant circumstances, two miles was not "an unreasonable distance to travel without train brakes" (App. *infra*, p. 28).

Chief Judge Sobeloff, dissenting as to counts 1, 2 and 4, in a full survey of this Court's cases in the field, particularly alluded to the absence of stops in the movements and the consequent impropriety of judging the specific trips by the irrelevant fact that, upon other occasions, shorter runs, and truly switching operations, might emanate from the particular track (App. *infra*, pp. 30–31).

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fourth Circuit—and, as we shall show, some other courts as well—have come to deem the applicability of the Safety Appliance Act to depend upon the judgment of the court as to whether, upon the facts before it, power brakes are socially or economically desirable in a particular operation. But neither Congress nor this Court, in its prior decisions under this Act, have left the question of the desirability of power brakes for such an amorphous and subjective determination. Congress, in the statute, requires that minimum air brake connections be coupled on "any train" (*supra*, pp. 2–3). And this Court, in the four cases in which

it dealt with the efforts of railroads to avoid this requirement (and rejected contentions similar to those accepted by the court below), laid down a clear rule that the movement of cars as a unit, without uncoupling or switching out cars, is the movement of a train (see *infra*, pp. 12–14).

The departure from this clear and simple standard has led to confusion and conflict among the courts of appeals (see *infra*, pp. 14–18), and this in turn has led to increasing failure by the railroads to observe the protective measures required by Congress. This is well illustrated by this case where the respondent, after using air brakes on the type of runs here involved for five years, decided to try to save the cost of using such brakes (*supra*, p. 5). And respondent has been sustained in this change on the basis of a host of considerations which have nothing to do with the only question which should have been at issue—whether a "train" was assembled and run as a unit separate from and beyond the assembling or switching process. Thus, the district judge entered into findings concerning other safety devices, such as crossing guards, as if these could suffice as a substitute for the air brakes that Congress required. Further, the designation of "yard limits" by the railroad was emphasized, despite the arbitrary nature of that designation and the inclusion therein of a track extending two miles from the classification yard.[5] The possible

[5] The testimony was clear that only in the "classification yard" were cars "switched and blocked according to the consignee intended." The track leading out of the classification yard, and the track for interchange with Norfolk & Western,

use of spurs from the track, on other occasions, for true switching operations was considered as affecting the movements here where no switching occurred on the two-mile run, a fact known to the crew before the cars were started on the journey.

This misreading of the statute and the decisions of this Court will inevitably result in accelerating disregard of the statutory requirement. The Interstate Commerce Commission advises us that the ruling involved in the decision below is applicable to thousands of transfer movements occurring daily on the railroads in the United States; that of recent date there has been an increasing tendency to claim that particular operations are not train movements; and that now, when larger cars and heavier loadings increase the hazard, the uncertainty as to the movements which are within the brake provision hampers effective enforcement of this important measure and jeopardizes the safety and welfare of railroad employees and the public.

1. We believe, with Chief Judge Sobeloff below (App., *infra*, pp. 29–41); that this Court has laid down a clear and simple rule that under this legislation "any train" means any movement of an assembled group of cars with an engine for an appreciable distance without coupling or uncoupling cars. The fact that at either end of the movement there has been or will be switching or assembling of cars does not convert a movement of a train of cars for a substantial distance into something other than a train movement. Even a train

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while nominally designated within "yard limits" were not within the classification yard (2 R. 45–47).

hauled across the country is assembled and disassembled at some point. The issue is whether the movement is as a train or whether switching is actually involved in the particular operation under consideration.

In *Louisville &c. Bridge Co. v. United States*, 249 U. S. 534, which involved a movement of 26 cars for ¾ of a mile by a company operating only a terminal yard, this Court pointed out the nature of the determination to be made, saying (p. 538):

> An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a "train of cars," but would certainly be so designated by men in general and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute. * * *
>
> The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot, therefore, with propriety be called a switching movement.

See also *United States* v. *Erie Railroad Company*, 237 U. S. 402, and *United States* v. *Chicago, Burlington & Quincy Railroad*, 237 U. S. 410, both holding that "transfer trains", taking groups of cars "as a unit" (237 U. S. at 412) from one place of receiving, breaking up, assorting, storing and distributing, to another,

were subject to the safety requirement, since the operation was the transportation of a train of cars and not their distribution or assembly.

In the *Louisville* case, the Court rejected the very considerations considered by the court below in this case—the attempt to argue lesser dangers in short runs and within-the-yard operations, and to show economic hardship in requiring coupling of the brakes. This Court said (p. 539):

> * * * [T]he construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply and that failure to comply will not be excused by carefulness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act [citing authorities].

Thereafter, in *United States* v. *Northern Pacific Railway Co.*, 254 U. S. 251, 254, a unanimous Court, in holding that the requirement was not limited to main-line runs, stated:

> It is admitted that this railroad is engaged in interstate commerce; and the cases cited show that transfer trains, like those here involved, are

> "trains" within the meaning of the act. A moving locomotive with cars attached is without the provision of the act only when it is *not* a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains. Congress has not imposed upon courts applying the act any duty to weigh the dangers incident to particular operations; and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented.

The simple construction of the language "any train" to apply to a continuous movement of cars accords with the purpose of the legislation. When the cars do not yet comprise a train—*i. e.*, when they are being switched—it would not be feasible to couple and uncouple the air brake connection every time a car is added or detached. But once the cars are assembled and move as a unit they are a "train" and Congress has concluded that air brakes are necessary.[6] The requirement fixed by Congress should not be disregarded because a railroad believes, and a court agrees, that some other kind of safety measure may suffice.

2. Despite the clear and emphatic nature of the foregoing holdings of this Court, there have been continuing efforts by the railroads, with varying degrees of success in various circuits, to expand the concept of switching operations to include continuous move-

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[6] The legislative history of the legislation shows that a substantial purpose was not merely to prevent collisions but to preclude the necessity of using brakemen atop the cars to man hand-brakes (H. Rep. No. 1678, 52d Cong., 1st sess., pp. 1, 3, 4–5; S. Rep. 1049, 52d Cong., 1st sess., pp. 29–31, 109–110).

ments of cars which ultimately have some relation to switching, even though no switching operations are involved in the actual movement. Considerations which were used by this Court to give force to its ruling that brakes must be applied to "any train" movement, including transfer trains, have been lifted out of context and given independent validity as factors to be considered in determining whether the movement is as a train or a switching operation, *e. g.*, the number of crossings, the use of the main line, the other precautionary measures, etc. The result is conflict among the circuits on the test to be applied and differing results on similar sets of facts. We submit that it is necessary, if the Act is to be enforced effectively and equitably in the interest of the safety of railroad employees and the public, that the standard be clarified (or, perhaps more accurately, reaffirmed) and the conflicts resolved by this Court.

Some years ago, the government requested this Court to consider this issue in relation to the conflict posed by the decision of the Seventh Circuit in *United States* v. *Chicago, Burlington & Quincy R. R. Co.*, 199 F. 2d 223, and that of the Second Circuit in *United States* v. *South Buffalo Railway Co.*, 168 F. 2d 948, certiorari denied, 335 U. S. 870, since the courts had reached diametrically opposed results on admittedly similar facts. We pointed out in the petition for a writ of certiorari in that case (No. 550, Oct. Term, 1952) that there was an increasing tendency to apply criteria (such as the degree of danger, and the number of grade crossings) which had no re-

lation to the standards fixed by this Court, *i. e.*, whether the movement was as a unit or whether switching was actually involved. This Court at that time declined to review the Seventh Circuit's decision. 345 U. S. 908. We respectfully submit that decisions in the intervening years, and particularly the decision below, have substantially increased the necessity for review by this Court. The confusion which now prevails has, as this case illustrates, led railroads more frequently to risk continuous movements of coupled cars without air brakes if the movements can somehow be related to switching operations. And the court below has added the force of its authority to that of the Seventh Circuit in permitting a departure from the standards fixed by this Court almost forty years ago.

The conflict among the courts of appeals has also become more pronounced. We think that the decision below is in conflict with that of the Eighth Circuit in *United States* v. *Thompson*, 252 F. 2d 6, holding that air brakes should have been used where nineteen cars were transferred from a yard to a plant about three miles distant, the cars were set out at the plant, and 25 cars were picked up and brought back to a yard. While it is true that in that case about a mile and a quarter of the three mile run was over main-line tracks, that factor is not controlling since this Court specifically held in *United States* v. *Northern Pacific Railway Co.*, 254 U. S. 251, that the Act applied whether or not a main line was used. The Eighth Circuit said in the *Thompson* case (252 F. 2d at p. 9):

> It is our understanding that when cars are assembled at one point in a railroad terminal and moved intact a considerable distance for delivery at another point in the same terminal, the movement is not a switching operation but is, as a matter of law, a train movement, and particularly so when main line tracks are used or crossed.

This is obviously a different standard from that applied by the court below and by the Seventh Circuit in the *Chicago, Burlington* case, *supra*.[7]

It is also different from the test applied by the Fifth Circuit in *United States* v. *Panhandle & Santa Fe Ry. Co.*, 203 F. 2d 241, 246. Although the decision in that case was favorable to the government on the particular facts involved, it does illustrate how far the courts are tending to depart from the simple criteria laid down by the decisions of this Court and properly recognized by the Eighth Circuit in the *Thompson* case. The Fifth Circuit said (203 F. 2d at p. 246):

> It is clear that since the statute involved provides no specific definition of a train, the Courts are required to consider and determine each case upon its own facts. * * * In testing the matter of compliance with the statute, the question is whether the facts show a train movement. In making this determination, the decisions, to some of which we have referred,

[7] In the Seventh Circuit, the government challenged a district court holding exempting transfer trains as switching operations. *United States* v. *Terminal R. R. Assoc.*, No. 12347. On November 19, 1958 the Court of Appeals affirmed. See Appendix B, *infra*, p. 42.

> usually consider, among other matters, the similarity of the movement in question to the usual line haul, the distance involved, the possibility of contact or hazard with other trains, and the evidenced statutory intention to attain safety of operation for other trains and railroad employees. The extent or presence of these features in the movement in question are compared and contrasted with the operations of switching, classifying and assembling cars within railroad yards for the purpose of making up a train and the resulting determination is dependent upon within which of these classifications the Court is convinced the operation in question falls. Possibility of injury to vehicular traffic and pedestrians upon street grade crossings has been also weighed in determining whether the statute has been violated, but the validity of this feature as a controlling element is subject to question, especially unless it be borne in mind that absence of street crossings upon the route of a movement of locomotive and cars is only evidentiary upon the case as a whole and does not alone change a train movement to a switching operation.

We have referred only to these recent cases and not to the older decisions which they cite because the later cases show the present difficulties which confront both the Interstate Commerce Commission and the railroads. The Safety Appliance Act is now being so differently interpreted in the various circuits that neither the Interstate Commerce Commission nor the railroads have any clear guide as to whether a mass of operations properly fall within the statute. A simple statutory requirement has become a com-

plex economic and sociological problem with the outcome unpredictable even within a single circuit because of the many factors often weighed. We urge this Court to resolve that conflict and reaffirm the clear, simple standard it initially recognized Congress has fixed.

CONCLUSION

There is conflict and confusion among the courts of appeal as to the criteria to be applied in determining what constitutes a train movement for the purposes of the Safety Appliance Act. We think this conflict and confusion has arisen because of misconception of, and failure to apply, the standard laid down by Congress and recognized by this Court nearly forty years ago. It is therefore respectfully submitted that this Court should grant the petition for a writ of certiorari.

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Malcolm Anderson,
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Beatrice Rosenberg,
J. F. Bishop,
Attorneys.

November 1958.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7534

UNITED STATES OF AMERICA, APPELLANT,

v.

SEABOARD AIR LINE RAILROAD COMPANY, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND

(Argued March 6, 1958. Decided June 30, 1958.)

Before SOBELOFF and HAYNSWORTH, Circuit Judges, and WILLIAMS, District Judge.

Edwin J. Slipek, Assistant United States Attorney, (L. S. Parsons, Jr., United States Attorney, and Henry L. Hilzinger, Attorney, Interstate Commerce Commission, on brief) for Appellant, and Lewis Thomas Booker and Eppa Hunton, IV (Hunton, Williams, Gay, Moore & Powell on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

This is a proceeding under § 6 of the Safety Appliance Act (45 U. S. C. A. § 6) to collect the statutory

penalties for violations of the Act. The violations are said to have occurred when, on four occasions, the railroad moved cars without coupling their brakes so that they could be operated by the engineer. It is admitted that, in each instance, the only operable brakes were those upon the engine, so the only issue is whether or not the movements were train movements within the contemplation of the Act (45 U. S. C. A. § 9) and the supplementary orders of the Commission.

In distinguishing between "train movements," in which the brakes of the cars must be coupled and operable, and switching movements, in which they need not be, courts have considered so many circumstances as affecting the character of the movement that we should first refer to the trackage and operations of the Seaboard in Hopewell, Virginia, where the movements occurred.

Hopewell, Virginia, is served by a branch line of the Seaboard which connects with the main line at Bellwood and terminates at Hopewell. Incoming trains from Bellwood arrive at a classification yard where they are broken up and from which the cars are distributed to consignees in Hopewell. Much of the distribution is effected over a lead track, which winds through the industrial section of Hopewell for a total distance of approximately two miles. Nine spurs, springing from the lead track, serve industrial customers whose plants are adjacent to them, and some of them are used for car storage. The spur, or customer lead, track most distant from the classification yard serves a plant of Continental Can Co., while the one second in distance from the classification yard serves a plant of the Allied Chemical & Dye Co. A track for the interchange of traffic with the Norfolk and Western also springs from the lead track at a

point approximately midway between the classification yard and the end of the lead at Continental Can Co.

The Norfolk and Western has lead tracks paralleling the Seaboard lead throughout most of the length of the latter, and several of the Norfolk and Western industrial spurs cross the Seaboard lead track. At such crossings, the Seaboard has the right of way, and Norfolk and Western crews must bring their engines to a complete stop before crossing the Seaboard lead track. The leads of both railroads cross several streets and private ways. The crossing of one of these streets, a state highway carrying a substantial amount of traffic, is protected by a watchman and manually operated gates. The crossings of other streets and ways are protected only by stationary signs.

There is no perceptible grade on the Seaboard lead, and all movements over it are at yard speeds and under yard control. It is a part of the Hopewell Yard, and serves no purpose other than the distribution of cars from inbound trains broken up in the classification yard and the assembly of cars to be made up, in the classification yard, into outbound trains.

When an incoming train has been broken up in the classification yard, a switch engine couples on to those cars which are to be delivered over the lead track. Acting under orders of the local freight agent, the switching crew proceeds to distribute the cars over the lead track. Those consigned to customers on Seaboard spurs are spotted on the appropriate spur, while those destined to points on the Norfolk and Western are placed upon the interchange track. Because of the specialized needs for different types of cars,[1] the crew may be required, en route, to pick up

[1] Most of the material delivered to Allied Chemical & Dye, for instance, is in coal hopper cars and boxcars, but most of its product is shipped out in tank cars.

of other railroads, one of which carried passenger trains; and that, for a distance of about one mile, two other railroad companies, "under the usual traffic-right agreements," also used the D. T. Tracks for delivering cars to consignees. Although, at two intermediate points along the D. T. Tracks there were 9 and 6 tracks, respectively, where cars were frequently set out or picked up by the transfer trains, the Court noted that the two movements in question were accomplished without stops. The fact that on other occasions the locality was used for switching operations was not permitted to outweigh the fact that at the times under inquiry, no stops were made to switch cars. In our case, not only were there no such stops but, as before mentioned, three of the runs were begun with the fore-knowledge that no stopping or switching would be required.

In answer to the argument that the trains were not operated on a main line, Justice Brandeis stated that if use of a main line were essential, the requirement would be satisfied by the presence of other freight trains, quoting the language of Justice Van Devanter in the *Chi., Burl. & Q. R. R.* case that the defendant's trains and those of other railroads "which the statute was equally designed to protect," "were exposed to the hazards which that provision was intended to avoid or minimize." 254 U. S. 254. "But," continued Justice Brandeis, "there is nothing in the Act which limits the application of the provision here in question to operations on main line tracks." Thus he made it plain that even if there had been no other trains using the tracks, the legal result would have been the same.

The inescapable rationale of the four Supreme Court cases, as developed and refined in the *Northern Pacific Ry. Co.* case, is that transfer movements, even of the nature shown here (to and from industrial and

cars from storage tracks and place them upon other spurs for loading. On the return trip,[2] the switching crews pick up from the spurs loaded outbound cars and empty cars for which the customer has no need, and, from the interchange track, cars which had been placed there by the Norfolk and Western for delivery to the Seaboard. These cars are then distributed to storage tracks breaking from the lead track or to the classification yard as circumstances may require.[3] Outbound cars are then made up in the classification yard into an outbound train.

No question has been raised about any movement in either direction over the lead track during which the crew worked a spur relatively near the classification yard. It is asserted, however, that an isolated movement in either direction becomes a train movement if only the more distant spurs are worked. Thus, the charges here are based upon two movements from the classification yard to the Continental Can lead track without intermediate stops and upon two movements from the Allied Chemical lead track to the classification yard during at least one of which there was an intermediate stop en route to pick up additional cars from the interchange track.[4]

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[2] It is possible that the operation in the two directions may overlap to some extent. If cars are to be delivered to a spur and other cars picked up from the same spur, it may be that both operations would be performed at the same time, but the record before us does not disclose the practice here.

[3] On one of the movements toward the classification yard, the engine left the Allied Chemical lead track with twenty-nine loaded cars, stopped at the interchange track to pick up six loaded and fourteen empty cars and arrived at the classification yard with forty-nine cars. On the other questioned movement in that direction, records of the railroad indicate the engine left the Allied Chemical lead track with four loaded and one empty car, stopped at the interchange track to pick up one loaded and twenty empty cars and arrived at the classification yard

The fact that less than all of the nine spurs may be worked during a particular movement has no controlling significance. Nor do we believe the answer is to be found in an identification of the spurs actually worked. The nature of the work, its purpose and character are precisely the same, whether every other spur is to be worked, only those between the classification yard and the interchange track or only those, or one of them, between the interchange track and the end of the lead track. Whether these spurs are to be worked or those, the business of the switch engine and its crew here is the distribution of cars from trains which have completed their over-the-line run and the collection and assembly of cars to be made up into outgoing trains.

Nor do we accept the Government's contention that "since the defendant moved (cars) between designated points in its yard for a distance of about 2 miles without picking up or setting out any car en route," the movement must necessarily have been a train movement requiring operable train brakes. Substantially every switching operation involves such movements, many for comparable distances, but they take on the appearance of train movements only when lifted from their context of switching operations and separated from their function and purpose. It is not enough, ignoring what transpires before and what follows, to say that cars were moved from this point to that; the character of the operation is to be determined by

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with twenty six cars, but an inspector for the Commission had testified that all twenty-six cars were moved from the Allied Chemical lead track without a stop at the interchange track.

The two movements from the classification yard to the Continental Can lead track were of twenty-eight and twenty-three cars, respectively. In each of these movements, some of the cars were ahead of the engine and others were behind it.

a look at the whole and with due regard to all elements of its setting.

Thus viewed, we agree with the District Court that these movements were properly classified as switching movements. In the average day there were ten of such movements, and they do not fall into separate categories solely upon the basis of a classification, in terms of relative distance from the classification yard, of the spurs worked. The lead track, the spurs that break from it and the classification yard are all parts of one yard, and its extremities are not so distant as to deprive a movement from one end of the yard to the other of the flavor of its function in breaking up and making up trains.

Unlike other sections of the Safety Appliance Act which apply to the use or haulage of a locomotive or a car, the train brake provisions apply only to the running of trains. The difference in language is an appropriate expression of Congressional intention, in the adoption of the train brake provisions, to distinguish between an over-the-line run, during which the need of useful train brakes was great and obvious and compliance with the requirement would not unduly hinder railroad transportation, and switching operations, during which there is little or no need for train brakes and general and strict compliance with the requirement would be impossible or highly impractical. The distinction was pointed out by the Supreme Court in the first case involving the train brake provisions to come before it. *United States* v. *Erie Railroad Company*, 237 U. S. 402, 35 S. Ct. 621, 59 L. Ed. 1019, and, a week later, the Supreme Court declared the controlling test to be "the essential nature of the work done." *United States* v. *Chicago, Burlington & Quincy Railroad Company*, 237 U. S. 410, 35 S. Ct. 634, 59 L. Ed. 1023.

But movements of trains and cars are so varied that the distinction between the fast, through train and the simplest switching operation is not always easily applied. Functionally, a transfer movement between separated yards may be a switching operation, but, particularly if it moves over main line tracks, it has elements of similarity to movements between major terminals and many of the underlying reasons for the train brake requirement are present. Train brakes are usually required in such movements. *United States* v. *Erie Railroad Company*, 237 F. S. 402, 35 S. Ct. 621, 59 L. Ed. 1019; *United States* v. *Chicago, Burlington & Quincy Railroad Company*, 237 U. S. 410, 35 S. Ct. 634, 59 L. Ed. 1023; *Louisville and Jeffersonville Bridge Co.* v. *United States*, 249 U. S. 534, 39 S. Ct. 355, 63 L. Ed. 757; *United States* v. *Northern Pacific Railway Company*, 254 U. S. 251, 41 S. Ct. 101, 65 L. Ed. 249; *Chesapeake & O. Ry. Co.* v. *United States*, 4 Cir. 226 F. 683; *Illinois Central R. Co.* v. *United States*, 8 Cir., 14 F. 2d 747; *Chicago & E. R. Co.* v. *United States*, 7 Cir., 22 F. 2d 729; *United States* v. *Southern Pacific Co.*, 9 Cir., 60 F. 2d 864; *United States* v. *Southern Pacific Co.*, 9 Cir., 100 F. 2d 984. Movements for the distribution and collection of cars have been held subject to the train brake provisions when conducted over main line tracks. *United States* v. *Panhandle & Santa Fe Ry. Co.*, 5 Cir., 203 F. 2d 241; *United States* v. *Thompson, Trustee*, 8 Cir., 252 F. 2d 6, but similar movements over yard tracks have generally been held to be exempt switching operations. *United States* v. *Great Northern Ry. Co.*, 9 Cir., 73 F. 2d 736; *United States* v. *New York, C. & St. L. Ry. Co.*, 7 Cir., 77 F. 2d 215; *United States* v. *Elgin, J. & E. Ry. Co.*, 7 Cir., 182 F 2d 1; *United States* v. *Chicago, Burlington & Quincy R. Co.*, 7 Cir.,

199 F. 2d 223; *United States* v. *Pennsylvania Railroad Co.*, D. C., Md., 80 F. Supp. 965; *United States* v. *Great Northern Ry. Co.*, W. D., Wis., 103 F. Supp. 889; *United States* v. *Staten Island Rapid Transit Railway Company*, E. D., N. Y., 151 F. Supp. 911. Cf. *United States* v. *South Buffalo R. Co.*, 2 Cir., 168 F. 2d 948. Even though the movements with which he was concerned were over main line tracks, Judge Hutcheson, now Chief Judge of the Court of Appeals for the Fifth Circuit, held that the train brake requirements were inapplicable because of the short distances between the spurs to be worked. *United States* v. *Texas & N. O. R. Co.*, S. D., Texas, 13 F. 2d 429.

The movements here were not over main line tracks, nor even inter-yard connecting tracks. They moved, entirely within the confines of one yard, over a lead track only two miles long from which there sprang nine spurs and an interchange track. Since the nature of the work was clearly the distribution and collection of cars following the breakup of trains and preparatory to the make-up of others, we are convinced they were switching operations, exempt from the requirement of train brakes.

The classification of cars, narrowly considered, is but one of several exempt switching activities. Spotting cars upon a team track alongside classification tracks is equally exempt. Delivering cars to spurs is no less typical of switching than classification, and the considerations which exclude the one from the train brake requirement are applicable to the other. Movements over the lead track, from one spur requiring attention to the next, are an inseparable part of the switching activity, when the lead track is used, in fact, as an integral part of a yard in which the cars have been received or from which they are to

be dispatched. Nor can we say, having due regard for the nature of the track, its connections and its use, that two miles is an unreasonable distance to travel without train brakes, when the "nature of the work done" is so clearly switching.

Much of the emphasis in the submission of the case has been upon the crossings of streets and of spurs of the Norfolk and Western, the Government pointing to them as potential hazards, while the railroad advances its safety record under the precautions of yard rules and asserts that the use of train brakes will increase, rather than minimize the risk of injury to trainmen, for they will be required to pass between the cars to couple the hose. Consideration of such crossings of streets and tracks is not irrelevant, for they are a part of the physical setting in which the movement must be viewed in order to determine its nature and character. A switching operation does not cease to be a switching operation, however, merely because the movement crosses a highway or spur track. Many an industrial spur crosses a public or private way, but spotting a car on such a spur does not become a line haul on that account. Movements over or across main line tracks may stand upon a different basis, where the switching movement becomes a potential hazard in the operation of main-line trains, but crossing other yard tracks is a common incident in switching and their ownership by another railroad is not a significant circumstance.

It is not contended here that the Act properly or rationally may be construed to require the use of train brakes on every switching movement which crosses streets or highways or the yard tracks of another railroad. On the contrary, it is conceded that movements over these same crossings are exempt from the re-

quirement if shifting is done relatively near the classification yard, a circumstance having no relation to the suggested hazard of the crossings. Whether or not a car has been placed upon a particular spur, the risk of collision with vehicular traffic at Randolph Street, and the other crossings, is precisely the same.

Where Congress has commanded the use of train brakes, the courts cannot excuse a failure to use them because of the use of other devices and measures, however effective in assuring safety they may be. If it were accepted that the Act should be construed to require train brakes whenever their use would contribute substantially to the safety of operations, an appraisal of the effectiveness of other measures would be necessary to decision, but it is not even contended that the Act has any such meaning.

Equally irrelevant, if Congress has required the use of air brakes, is consideration of the substantial cost to be imposed upon the railroad and of delay in the handling of freight. But if the use of train brakes on these movements is costly, delays shipments and creates new risks of injury without substantially contributing to the alleviation of existing risks, it is a reminder that courts should not extend the requirement beyond the intention of the Congress or needlessly chip away major portions of the long established exemption of switching operations.

Affirmed.

SOBELOFF, Circuit Judge, concurring in part and dissenting in part:

After four and one-half years of operating its railroad cars between the Hopewell classification yard and the plants of the Continental Can Company and Allied Chemical & Dye Company in compliance with the airbrake provisions of the Safety Appliance Act (45 U. S. C. A., Sec. 9), the defendant, in March,

1956, ceased using airbrakes. I cannot agree that the change in practice was legally justified, and after consideration of the very persuasive majority opinion, I am nevertheless constrained to dissent from the holding that none of the four movements in question constitutes a "train" movement within the meaning of the Act. As to three of them at least, those in which there was no picking up or shunting of cars en route,[1] the Act seems clearly applicable.

The facts of the case have been painstakingly stated and, with few exceptions, require no amplification. These exceptions are, however, crucial. It should be mentioned as more than coincidence that three of the four movements were accomplished without stops en route. The defendant's own evidence is that Seaboard's agent at Hopewell, Mr. Morrison, customarily receives lists from the various industrial plants along the line, informing him of the cars to be picked up by Seaboard. The "yard people" are then issued instructions as to the cars to be moved to and from the plants. Therefore, as to the first movement in question (count number 1), when Seaboard's crew coupled together an engine and 26 cars at the Allied Chemical and Dye Company plant on March 5, 1956, it was known to them that they would proceed, nonstop, for a distance of two miles, and, in the second movement on that day (count number 2) and the one in question which occurred the next day (count number 4), 28 and 23 cars, respectively, were assembled for uninterrupted two-mile runs from the Hopewell classification yard to the Allied Chemical and Dye

[1] Although there was a conflict in the evidence whether one or two of the movements were interrupted by switching operations en route, the District Judge resolved the conflict by finding a stop for switching in only one of the four, the one alleged as the third violation.

Company and the Continental Can Company's plants. Except for their role in the topographical setting, therefore, the presence of a number of other closely-spaced industrial spurs which may, at different times, be worked is irrelevant to this case. The fact that, on other occasions, frequent stopping and shifting of cars might make the process of coupling and uncoupling airbrakes utterly impractical, is equally unimportant so far as the movements here involved are concerned. This feature of the case should not be ignored.

The question, then, is whether a train, to be subject to the Act, may consist of a locomotive and 23 or more cars which have been either assembled from incoming trains or picked up at one location, and which are to proceed, nonstop, for a distance of approximately two miles, where, at their destination, they are either unloaded or reassembled into outgoing trains.

In terms, the Act requires airbrakes to be used on "all trains * * * used on any railroad." As my colleagues have observed, however, the Supreme Court, in a series of four cases, drew a distinction between "train" and "switching" operations, ruling that the airbrake requirement was inapplicable to the latter, and declaring the test to be "the essential nature of the work done."

The character and extent of the "switching" exemption, and the relative weight due the various criteria in the application of the "essential nature" test, can best be ascertained by examining and appraising the various contexts in which they were judicially created and authoritatively applied. Resort to the Supreme Court cases, in some detail, becomes necessary.

The first was *United States* v. *Erie R. R.*, 237 U. S. 402, decided by a unanimous Court in 1915. The

defendant railroad operated a freight yard at Bergen, New Jersey, where regular eastbound freight trains were stopped and broken up and regular westbound freight trains made up and started. Following the break-up of the eastbound trains, and before the assembly of westbound trains, temporary groupings of cars, known as "transfer trains," were made up and moved to and from two other freight yards. The first, the Jersey City yard, was located two miles from Bergen, and the other, the Weehawken yard, three and one-half miles from Bergen. The trains ran only between these yards, usually had about twenty-five cars, carried no caboose, were operated by crews and engines specially engaged in that service, and at irregular intervals under the orders of yardmasters, at speeds of seven to eighteen miles per hour. Without using the requisite number of airbrakes, nine transfer trains were hauled from Jersey City to Bergen, six from Bergen to Weehawken, two from Weehawken to Bergen, and one from Bergen to Jersey City. These operations, similar to the ones in question here, were held to be train operations within the meaning of the Safety Appliance Act.

It is, of course, arguable that a distinction exists between the work done in *Erie* and the instant case, in that the cars here were being hauled to and from their ultimate consignees, whereas in the *Erie* case, the cars received by the Jersey City and Weehawken yards were then to be delivered further to their industrial and commercial consignees. Such a distinction, if suggested, would not be a valid one, and the *Erie* opinion itself refutes it. In summing up the decision in *Erie*, the Court, through Mr. Justice Van Devanter, said: "We, therefore, conclude and hold that it [the airbrake provision of the Safety Appliance Act] embraced these transfer trains. Its ap-

plicability to this class of trains was considered and sustained in * * * *United States* v. *Pere Marquette Railroad*, 211 Fed. Rep. 220 [D. Ct. W. D. Mich., 1913]. * * *" The approval and adoption by the Supreme Court of the decision in *Pere Marquette* is significant, because the District Court held in that case that the transfer of a string of 17 cars, assembled from incoming trains which had been broken up, for a distance of two miles within the general yard limits of the City of Grand Rapids, the cars to be unloaded at their destination, constituted a "train" movement within the meaning of the Safety Appliance Act. Thus, as early as the *Erie* case, it was decided that a "transfer train" may consist of a string of cars hauled a short distance for unloading as well as further forwarding.

A week after its decision in *Erie*, the Supreme Court rendered its decision in the second of the pertinent cases, *United States* v. *Chi., Burl. & Q. R. R.*, 237 U. S. 410 (1915). Again dealing with transfer trains hauled for a short distance (2 miles), this time around Kansas City, Missouri, the Court concludes that the trains in question were "exposed to the hazards" which the airbrake provision "was intended to avoid or minimize," and the movements were held to be train movements. P. 412. The railroad argued that the work of moving the transfer trains was being done by switching crews, and in answer to this contention, the Court formulated what has become known as the "essential nature" test: "Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied against it." P. 413.

In the third of the Supreme Court decisions, *Louisville &c. Bridge Co.* v. *United States*, 249 U. S. 534 (1918), moving, for a distance of three-quarters of a mile, a string of 26 cars which had been assembled for delivery to another railroad, was held to be a train movement. Mr. Justice Clarke, writing for the Court, stated: "An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a 'train' of cars, but would certainly be so designated by men in general and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute." P. 538. Discounting the argument that the work done was merely part of a switching operation, Justice Clarke pointed out that the features considered generally as constituting exempt switching movements, were not present: "The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot, therefore, with propriety be called a switching movement." P. 538.

Finally, in *United States* v. *Northern Pac. Ry. Co.*, 254 U. S. 251 (1920), the Supreme Court was presented with a fact situation almost identical to the one in question here, and again without dissent, the Court held that the movements involved constituted train movements. The history of the *Northern Pac.* case is interesting for two reasons. First, the facts are more fully developed in the Court of Appeals opinion and, second, the Court of Appeals, which was reversed, took the same approach to the case I have my colleagues here.

South of the main tracks at Duluth, Minnesota, were several tracks known as the "Duluth Terminal" or "D. T. Tracks." They were operated as a single yard, and no part of them was ever used by any trains running between stations, freight or passenger, but, as in our case, they were used "exclusively * * * to supply the industries along these tracks with loaded cars or empties to be loaded for outgoing freight, for deliver[y] to the main line." 244 F. 655, 657, 658. The trains were not operated according to fixed schedules, but were moved under the yardmaster's orders at such speeds that they could be stopped at vision. Two strings of freight cars, consisting of 40 and 48 cars, respectively, were run along this line for a distance of approximately 4 miles at speeds varying between three and eighteen m. p. h. The Court of Appeals for the Eighth Circuit thought the earlier Supreme Court cases distinguishable in that the movements involved in those cases were along main line tracks and not devoted exclusively to the servicing of local industries. Affirming a directed verdict for the defendant railroad, the Eighth Circuit held: "From these facts no other conclusion can be reached than that of the learned trial judge, that these train movements were mere switching operations, and therefore not within the airbrake provision of the Act of Congress, as determined in the *Erie* and *Chicago, Burlington & Quincy Railroad* cases, *supra*." 255 F. 655, 658.

The Supreme Court, in an opinion by Justice Brandeis, disagreed. It held that the movements along the D. T. Tracks in the Duluth area were movements of transfer trains within the doctrine of the three prior cases, and were not switching operations exempt from the Act. The Supreme Court found it "material" that the tracks crossed two streets at grade; five tracks

commercial consignees), and even on tracks specially used for that purpose, are train movements subject to the airbrake provisions of the Act if they are not accompanied by the picking up and delivery of cars en route (which would necessitate the frequent coupling and uncoupling of air hoses), and if there is an exposure to the hazards which the Act was designed to avoid or minimize.

Our inquiry should then turn to discover the purposes of the Act and to examine whether the existing factual circumstances involve the dangers sought to be avoided.

In *Louisville &c. Bridge Co.*, Justice Clarke stated that it is the purpose of the Act to secure the "safety of employees, of passengers and of the public. * * *" 249 U. S. 534, 538. In distinguishing between "passengers" and "the public," the Court made it clear that, as interpreted by them, the Act was designed to extend protection to more than employees and users of railroads. Viewing the general public as direct and not incidental beneficiaries of the Act's provisions, the topographical setting of the Hopewell area, especially the presence of intersecting streets and railroads, comes into focus as an essential element in determining the issue whether the activities involved are "train movements."

Passing to the details of the territory through which the questioned movements were made, it should first be noted that a number of tracks of the Norfolk and Western Railway cross those of Seaboard at grade, and the Norfolk and Western, which also maintains tracks similar to Seaboard's here and which parallel Seaboard's, uses the intersecting tracks to make deliveries of cars to the various industries along the route. Moreover, according to the testimony of Mr. Roy E. Kean, Seaboard's assistant superintend-

ent at Richmond, engines of the Norfolk and Western Railway and the Allied Chemical and Dye Company, as well as those of the defendant, operate over the defendant's tracks in the vicinity of Allied Chemical and Dye for a short distance.

In addition to private road crossings, five public streets intersect the defendant's tracks. One, known as DuPont Street, is the means of access to Allied's plant. Another, Terminal Street, is the situs of the headquarters and main fire station of the Hopewell Fire Department, which also houses automotive equipment of the Hopewell Emergency Squad. The evidence showed that vehicles of the Fire Department have occasion to use the Terminal Street intersection, although there was no direct evidence of there having been interference, by the defendant, with the passing of their vehicles. Randolph Street, also known as Virginia State Route 10, is the main automobile route between Richmond and Norfolk. It is a "heavily travelled" road, and at the point where it crosses the Seaboard tracks, there is a sharp curve which materially restricts visibility of railroad cars approaching the crossing from either direction. While it is true that the crossing is protected by manually operated gates, the Supreme Court in *Louisville &c. Bridge Co.* declared that the very presence of gates at street crossings "serve[s] to emphasize the dangerous character of the movement." 249 U. S. 534, 539.

Palm Street and Hopewell Street also cross the Seaboard tracks, and the latter leads to the Hercules Powder Company plant, described in the testimony as a "relatively large plant." These two intersections have been the scenes of four collisions with automobiles since 1941, and three of them involved trains not having their airbrakes in operation.

Although the Randolph Street intersection is the only one protected with more than stationary signs, as the District Judge found, traffic over the street crossings varies from moderate to heavy. The moderate traffic, which occurs at hours coinciding with the usual hours of the defendant's movements along the tracks, is by no means insubstantial.

The evidence, moreover, shows that Seaboard frequently operates its trains with a number of cars in front of the locomotive as well as behind it, thereby increasing the danger. Two of the movements in question here (counts 2 and 4) were made with 13 and 8 cars, respectively, ahead of the engine. Because the engineer's range of vision is consequently reduced, there is, in these situations, still more reason for requiring the use of airbrakes. J. R. Hoag, a retired I. C. C. inspector, who is employed by Seaboard as Safety Consultant, was sent to Hopewell to survey the area and, in a letter to Seaboard's General Superintendent, he wrote, "* * * in cases where any considerable number of cars, probably more than ten, are pushed ahead of the engine, then the air brakes should be coupled on those cars and a tail hose provided so the trainman on the leading car can control the movement in case of emergency." He also advised that "there is no question that where air brakes are coupled and in use on a cut of cars, quicker stops can be made from any speeds."

Since it appears that an important factor in the essential nature of the work done is the potential hazard to those whom the Act is designed to protect, and since the Act has been construed as having been designed to include the general public in its protection, the sum of the elements in this case makes it more than evident that Seaboard has violated the

Safety Appliance Act as to at least three of the movements in question.

The majority opinion relies on several cases which, under facts similar to those before us, held the movements only switching operations, exempt from the requirements of the Act. Notable are three cases from the Seventh Circuit. In the first of these, *United States* v. *New York, C. & St. L. Ry. Co.*, 77 F. 2d 215 (1935), the Court cited *Louisville &c. Bridge Co.* v. *United States*, 249 U. S. 534 (1919), as the closest Supreme Court case, and distinguished it on its facts. The *Northern Pacific* case, 254 U. S. 251, which is indistinguishable, was apparently overlooked. Fifteen years later, however, when *United States* v. *Elgin S. & E. Ry. Co.*, 182 F. 2d 1 (1950), was before that Court, *Northern Pacific* was cited to it, and the Seventh Circuit distinguished it on the basis of there having been two street crossings and five rail crossings at grade in *Northern Pacific*, whereas in *Elgin*, no public streets or other railroads were crossed at grade, only two private roadways. The third case, *United States* v. *Chicago, B. & Q. R. Co.*, 199 F. 2d 223 (1952), was decided two years after *Elgin*. Although in *Chicago, B. & Q.* one of the questioned movements was a two-mile straight run which crossed two public streets at grade, and rode over a track used by two through trains passing between Eola and West Chicago, the Court nevertheless followed its decision in *Elgin* and held that it was only a switching movement. Again the indisputably contrary *Northern Pacific* case went undistinguished and unmentioned.

"There is no need to labor over decisions irreconcilable with those of the Supreme Court, for it is our duty to follow the law as laid down by that body, and not the contrary holdings of other courts."

The Second Circuit, on the other hand, in *United States* v. *South Buffalo R. Co.*, 168 F. 2d 948 (1948),

held that the crossings of a private way in movements similar to those here was a sufficient element to render the movements those of "trains" within the meaning of the Act. Judge Augustus Hand, speaking for the Court, declared: "We think it undesirable for the courts by their decisions to enable railroads to eliminate safety appliances where hazards undoubtedly exist to some substantial degree and where the use of such appliance would insure increased protection." 168 F. 2d 948, 952. The Second Circuit is, I think, in harmony with controlling authority.

I would affirm as to count 3, and reverse as to counts 1, 2 and 4.

JUDGMENT

Filed and Entered June 30, 1958

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7531

UNITED STATES OF AMERICA, APPELLANT

v.

SEABOARD AIR LINE RAILROAD COMPANY, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

June 30, 1958.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12317

September Term and Session, 1958

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, DEFENDANT-APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS

November 19, 1958

Before DUFFY, *Chief Judge*, and FINNEGAN and KNOCH, *Circuit Judges*.

DUFFY, *Chief Judge*. Two civil suits containing six causes of action were brought against defendant to recover penalties for alleged violations of the Safety Appliance Acts, Title 45 U. S. C., Secs. 1–16, and an order of the Interstate Commerce Commission issued pursuant thereto. At issue on this appeal are the two causes of action in Civil No. 3473 and the first two causes of action in No. 3202. These four involve an interpretation of section 9, the Air Brake Provisions of the Statute.

Section 9 of the Act provides that when any train is operated with power or train brakes not less than

fifty percentum of these cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and provides that the stated minimum percentage may be increased by order of the Interstate Commerce Commission. Such an order was issued in June, 1910, increasing the percentage to 85%.

There is no dispute that defendant did not have the required percentage of air brakes in use and operation on the movements hereinafter described. The sole question is whether the movements complained of were those of "trains." The District Court found and determined that the movements were switching operations, hence the statute had not been violated.

None of the movements in this case involves the use of main line tracks. All of the movements were under the direct control of the Assistant General Yardmaster who had radio contact with all engines operated on the tracks in question. The work was accomplished by switching crews with the use of a switch engine.

The first movement complained of is No. 3202 originated in defendant's Yard No. 2, where the crew reported for work and were assigned their engine. This crew assembled cars from the No. 2 yard which were destined for No. 5 yard and for various industries to be served by that crew on that day. They proceeded to Yard No. 5 where they cut out cars which were to remain at Yard 5, and added cars destined for the industries to be serviced by the crew such as American Zinc Co., Darling & Co., Monsanto, etc. The movement of the engine and 27 cars proceeded southward along what is known as the conlogue track to a point where the conlogue is intersected by tracks of the G M & O Railway and by the Southern Railway. The distance to this point from No. 5 yard is less than 1,000 feet. The movement stopped in obedience to a

stop board and the operating rules of defendant. The crew checked the crossing visually and reported to the engineer that the way was clear. There were no obstructions to a clear view in any direction.

The G M & O Railway and the Southern Railway have operating rules which require all movements across this crossing to make a positive stop. Furthermore, the tracks of the Southern Railway come to a dead end approximately 1,650 feet west of their crossing with the conlogue.

The movement proceeded from the crossing to a point just south of Monsanto Avenue where the movement was stopped and twelve cars were left on the south bound conlogue, and the movement proceeded to No. 2 siding where six more cars were set off, and the movement then proceeded to the siding of Darling & Company. At no time did this movement exceed ten miles per hour. The total distance of the movement was approximately 1¾ miles.

The movement set forth in the second cause of No. 3202 and the first cause of No. 3173 were identical except for the number of cars; there were 25 cars in the first instance and 37 cars in the second. Starting in Yard 5, the cars were drawn by a switch engine along the southward conlogue across the tracks of the G M & O Railway and Southern Railway as hereinbefore described. The movement proceeded to the south leg of the wye, then backed 2,500 feet along the south leg of this wye and across State Highway 3, a heavily travelled highway, and then on to side tracks leading to several industrial concerns. The total distance of the movement in each case was about 1¾ miles. No cars were picked up or set out enroute. The speed was not in excess of six miles per hour and when crossing Highway 3, was reduced to three miles per hour.

The movement set forth in the second cause of No. 3473 was made in the reverse direction to those of the second cause of No. 3202 and the first cause of No. 3473. It consisted of 18 cars starting from a back track near the Monsanto plant, and proceeding to Yard No. 2. The total distance of this movement was approximately 2¾ miles. No cars were picked up or set out en route. The speed of the movement did not exceed 6 miles per hour and was reduced to 3 miles per hour when crossing Highway 3. Protection at the Highway 3 crossing at the time of the movements here in question was provided by automatic flashing lights and a bell. More recently, automatic gates were installed.

A moving locomotive with cars attached is within the provision of the Act only when it is a "train. There is no definition of "train" in the Safety Appliance Act. However, it has been held that where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up a train, the movement is not a train. *United States* v. *Northern Pacific Railway Company*, 254 U. S. 251.

The courts have been unable to give a definite all-embracing definition of "train" within the meaning of the Act. We noted in *United States* v. *CB&QR Co.*, 199 F. 2d 223, 226: "After wrestling with it for some fifty years, courts have accomplished little other than to decide on the particular facts of the case whether the movement was that of a train within the meaning of the Act. * * *"

The most recent decisions of this Court upon the subject here under consideration are *United States* v. *CB&QR Co.*, 199 F. 2d 223, and *United States* v. *EJ&ERR Co.*, 182 F. 2d 3. In many respects the conditions surrounding the area where the movements

of engines and cars occurred in those cases were similar to the conditions existing in the case at bar. In each of the cited cases we held the movements were switching operations and that section 9 of the Act did not apply. Although previous court decisions in this field may not be as binding as precedents in other areas of the law, we believe in the interest of consistency that the same results should be reached if the surrounding conditions are similar.

The learned trial judge gave careful consideration to the opinions of this Court just cited as well as to numerous other opinions touching the question to be decided. The trial court reached the conclusion that the four movements in the case at bar were switching operations. We think a correct conclusion was reached. The decision of the District Court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.